85-1011

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH D. HARRIS AND JOAN F. HARRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts below erred in determining that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10031, exempts the respondents from United States taxation on the salaries they received from the Panama Canal Commission.

2. Whether the court of appeals erred in refusing to consider a diplomatic note the Republic of Panama delivered subsequent to entry of the trial court's judgment, setting forth the Panamanian government's interpretation of the Implementation Agreement.

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TABLE OF AUTHORITIES

Treaties:

Panama Canal Treaty, Sept. 7, 1977, United States-Panama, art. III, T.I.A.S. No. 10030 ..... 2, 25a

Agreement in Implementation of the Panama Treaty, Sept. 7, 1977, United States-Panama, art. XV, T.I.A.S. No. 10031 ..... 2, 25a

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 768 F.2d 1240. The opinion of the district court (App., *infra*, 21a-24a) is reported at 585 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1985 (App., *infra*, 19a-20a). On November 5, 1985, Justice Powell extended the time

for filing a petition for a writ of certiorari to and including December 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY AND EXECUTIVE AGREEMENT INVOLVED

Article III, paragraph 9 of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030, and Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama T.I.A.S. No. 10031, are set forth in App., *infra*, 25a-26a.

STATEMENT

During 1979, respondents resided in the portion of the Republic of Panama that had formerly constituted the Canal Zone. They were both employed by the Panama Canal Commission (Commission). For tax year 1979, they filed a federal income tax return and reported as income the salaries received from the Commission (App., *infra*, 1a-2a, 21a).

In 1980, they filed a claim for refund, in which they contended that salaries received from the Commission between October 1, 1979, and December 31, 1979, were exempt from United States taxation under Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty (App., *infra*, 1a-2a, 21a-22a). The district court agreed, concluding that paragraph 2 of Article XV was "needful of no interpretation," although, as the court acknowledged, the President and the Senate had a contrary view of the relevant provision (App., *infra*, 21a, 23a).

The court of appeals affirmed. It held that the "clear language of Article XV(2) of the [Implementing] Agreement creates a bi-national tax exemption" (App., *infra*, 1a, 18a). The court reasoned that

the testimony of the Legal Adviser of the State Department and the analysis of the treaty and its implementing executive agreements that the State Department presented to the Senate Committee on Foreign Relations, both of which indicated that no domestic exemption was intended, provided an insufficient basis upon which to conclude that the treaty partners "intended to agree on something different from that appearing on the face of" the Agreement (App., *infra*, 13a-17a, 18a). The court of appeals also refused to consider a diplomatic note the Government of Panama had delivered to the United States subsequent to the trial court's decision (App., *infra*, 8a). Even though the Government of Panama endorsed the United States' interpretation of the Implementation Agreement as having no effect upon the right of the United States to tax its own citizens, the court of appeals held that it would not consider diplomatic correspondence that had not been submitted to the trial court.

REASONS FOR GRANTING THE PETITION

This case involves the same provision of the Implementation Agreement that is involved in *O'Connor* v. *United States*, petition for cert. pending, No. 85-558 (filed Sept. 30, 1985).[1] The questions presented in both cases are identical, *i.e.*, whether the Agreement creates an exemption from United States income tax and whether the formal views of the Panamanian government should have been considered by the court of appeals. Here, the court decided each question in

[1] We are sending to counsel a copy of our consolidated response in *O'Connor* v. *United States*, No. 85-558; *Coplin* v. *United States*, No. 85-559; and *Mattox* v. *United States*, No. 85-560.

a manner that conflicts with the decision of the Federal Circuit in *O'Connor*. We demonstrated in our brief acquiescing in certiorari in *O'Connor* that the decision reached by the Federal Circuit is correct and consistent with the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's disposition in *O'Connor* v. *United States*, No. 85-558, and its companion cases.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-8424

RALPH D. HARRIS and JOAN F. HARRIS,
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

Aug. 14, 1985

Appeal from the United States District Court
for the Southern District of Georgia

Before KRAVITCH, CLARK and WRIGHT *, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

During 1979, Ralph and Joan Harris resided in the territory within the Republic of Panama that formerly constituted the Canal Zone. They worked for and received a salary from the Panama Canal Commission (PCC). They filed a joint federal income tax return and paid taxes allegedly due. In

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* Honorable Eugene A. Wright, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

1980, the Harrises filed a refund claim for excess taxes of $6,647 paid in 1979. The claim constituted taxes assessed on wages earned from the PCC from October 1 to December 31, 1979. The Internal Revenue Service (IRS) disallowed the claim.

The basis for taxpayers' refund claim is Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty (Agreement). Taxpayers assert it exempts U.S. citizens from taxation of income derived from their PCC employment. The government construes the Agreement as allowing an exemption only from Panamanian taxation.

The Harrises initiated this civil lawsuit in the district court for the Southern District of Georgia, where they then resided. On cross-motions for summary judgment, the court granted the plaintiffs' motion and entered judgment against the government for the amount sought, plus interest. 585 F.Supp. 862 (S.D.Ga.1984). We affirm.

PANAMA CANAL TREATY

Pursuant to treaty adopted in 1903, the United States constructed the Panama Canal. Isthmian Canal Convention, T.S. No. 431, 33 Stat. 2234 (Nov. 18, 1903). The treaty granted to the United States "the rights, powers and authority . . . which the United States would possess and exercise if it were the sovereign of the territory. . . ." *Id.*, Article III.

On September 7, 1977, the United States and Panama signed a second Panama Canal Treaty, T.I.A.S. No. 10030, which became effective on October 1, 1979. *See* 22 U.S.C. §§ 3601-3871 (West Supp. 1985). It restored to Panama territorial sovereignty over the Canal Zone and granted to the U.S. the right to manage, operate and maintain the canal

until the year 2000. The PCC is the agency through which the United States manages canal operations. *Id.*, § 3611.

Because sovereignty was being transferred from the U.S. to Panama, it was imperative to define the rights and legal status of PCC employees. Article III, paragraph 9, provides that:

> the rights and legal status of the United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

The issue before the court concerns interpretation of paragraph two of Article XV of the Agreement. Article XV, which governs taxation of the PCC, its contractors and subcontractors, and its U.S. citizen employees and their dependents, is quoted in its entirety.

Taxation

> 1. By virtue of this Agreement, the Commission, its contractors and subcontractors, are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.
>
> 2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.
>
> 3. United States citizen employees and dependents shall be exempt from taxes, fees or other

charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

Historically, U.S. citizens employed by the Canal Zone received favorable tax treatment. Until 1951, income earned by U.S. citizens employed by the Panama Canal Company or the Panama Canal Zone government was totally exempt from federal income taxation. Beginning in 1951, the income of those persons was taxed by this government at a lower effective tax rate than mainland taxpayers.

MOTIONS TO STRIKE

By motion on October 19, 1984, the appellees moved to strike footnotes 18 and 19 of the government's opening brief alleging lack of foundation, irrelevancy, incompetency and immateriality.[1]

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[1] Footnote 18 of appellant's brief states:

> We are informed that the Government of the Republic of Panama has never expressed any difference of opinion with respect to the position taken by the United States with respect to the domestic taxation of United States citizens who are employed by the Commission.

Footnote 19 states:

> Significantly, the official Panama Government publication of the texts of the Canal Treaties and related agreements, entitled *Tratados Del Canal de Panama* (1980), indicates that the Republic of Panama shares the United States'

Although the government did not request leave of court to file extra-record materials, it filed a diplomatic note from the Panamanian Government on March 1, 1985. This late filing of extra-record evidence prompted a second motion to strike by appellees. Therein, they challenged the manner in which the diplomatic note was prepared and presented to us.

The government opposed the motions, citing Supreme Court practice in this area of international diplomacy, which calls for supplementing the record with any material that might aid in treaty interpretation.

We shall dispense with the need for a formal order granting the motions.[2] We shall not consider the challenged material and we reject the government's suggestion that self-serving evidence outside the record, for which additional explanation is required, can be considered by this court.[3] *See United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir.1984) (per curiam) (appellate court reviewing grant of sum-

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view that the exemptions in paragraph 2 of Article XV apply only to Panamanian taxes. The index of that publication (at 313) contains a heading entitled 'IMPUESTOS (Republica de Panama)' (TAXES (Republic of Panama)) and lists thereunder, *inter alia*, 'Exenciones a los empleados ciudadanos de los Estados Unidos y sus dependientes por razon de su trabajo' (Exemptions to the United States citizen employees and their dependents by reason of their work) Ac—III, Art. XV, pars. 2, 3. No mention is made of exemption from United States taxation.

[2] Appellees' request for costs and expenses in bringing their motions is denied.

[3] At oral argument, counsel for the government conceded that this case may be decided on the record.

mary judgment can review only matters presented to the district court); *Mitchell v. Trade Winds Co.*, 289 F.2d 278, 279 (5th Cir.1961) (Labor Dept. files not in evidence before district court rejected on appeal)). *But cf. Dickerson v. Alabama*, 667 F.2d 1364, 1367 & n. 5 (11th Cir.) (appellate court has inherent equitable powers to supplement the record to include state court trial transcript in habeas corpus action), *cert. denied*, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982).

STANDARD OF REVIEW

In reviewing the grant of summary judgment, an appellate court must apply those legal standards that control the district court's determination. *Mercantile Bank & Trust Co. Ltd. v. Fidelity and Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir.1981). The appellate court may review only matters presented to the trial court. *Oakley*, 744 F.2d at 1556.

We apply the same rules of treaty interpretation to executive agreements implementing treaty provisions. Clear language controls unless it "'effects a result inconsistent with the intent or expectations of its signatories.'" *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 1057, 10 L.Ed.2d 184 (1963)). While possessing the force and effect of law, international agreements should be construed more like contracts than statutes. *See Santovincenzo v. Egan*, 284 U.S. 30, 40, 52 S.Ct. 81, 84, 76 L.Ed. 151 (1931) (international agreements are contracts between foreign states).

TAX EXEMPTION ISSUE

The issue before the court is one of first impression in this circuit. Lower courts generally have held for the government on this issue.[4] Recently, the Federal Circuit reversed the 46-page opinion for the taxpayers by Claims Court Chief Judge Kozinski. *Coplin v. United States*, 761 F.2d 688 (Fed.Cir.1985), *rev'g*, 6 Cl.Ct. 115 (1984). Appellees in the present case are supported by a group of similarly situated taxpayers as amici curiae, some of whom were appellees in the *Coplin* case.[5]

Our disagreement with the Federal Circuit concerns the admissibility of the diplomatic note sub-

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[4] *Rego v. United States*, 591 F.Supp. 123 (W.D.Tenn. 1984); *Stabler v. United States*, 84-1 U.S.Tax Cas. (CCH) ¶ 9153 (N.D.Tex. 1983); *Hollowell v. United States*, 84-1 U.S.Tax Cas. (CCH) ¶ 9142 (M.D.Fla. 1983); *Pierpoint v. United States*, 83-2 U.S.Tax Cas. (CCH) ¶ 9647 (D.S.C. 1983); *Snider v. United States*, 53 A.F.T.R.2d 349 (W.D.Wash. 1983); *Stokes v. United States*, 83-2 U.S.Tax Cas. (CCH) ¶ 9644 (W.D.Wash. 1983); *Long v. United States*, No. 83-158 (D.Or. July 22, 1983); *Swearingen v. United States*, 565 F.Supp. 1019 (D.Colo. 1983); *Watson v. United States*, 592 F.Supp. 701 (W.D.Wash. 1983); *Corliss v. United States*, 567 F.Supp. 162 (W.D.Ark. 1983); *Highley v. United States*, 574 F.Supp. 715 (M.D.Tenn. 1983); *Vamprine v. Commissioner*, T.C.M. (CCH) 1984-624; *Smith v. Commissioner*, 83 T.C. 702 (1984); *Collins v. Commissioner*, T.C.M. (CCH) (1983-762; *McCain v. Commissioner*, 81 T.C. 918 (1983).

Contra Harris v. United States, 585 F.Supp. 862 (S.D.Ga. 1984); *Coplin v. United States*, 6 Cl.Ct. 115 (1984), *rev'd*, 761 F.2d 688 (Fed.Cir. 1985).

[5] Taxpayers were represented at oral argument by counsel for the taxpayers in the *Coplin* case. Amici were represented in this appeal by the former General Counsel for the Panama Canal Commission.

mitted to both courts just before oral argument. The Federal Circuit accepted the note. *See Coplin*, 761 F.2d at 691 (denying appellees' motions to strike diplomatic note and cable from U.S. Embassy in Panama). Appellees' petitions for rehearing which attacked the note's reliability were denied.[6]

In *Coplin*, the Claims Court construed paragraph two literally because the United States government presented no statement of the official Panamanian position. *See* 84-2 U.S.Tax Cas. (CCH) at 85,002. Chief Judge Kozinski suggested that the absence of a diplomatic note hurt the government's position. *Id.* at 85,003 (drawing a negative inference from the government's refusal to produce evidence of Panamanian intent).

For the Federal Circuit, the diplomatic note and letters delivered to the panel the day of oral argument were dispositive. *See* Additional Views of Judges Bissell and Smith, 761 F.2d at 692. However, the records in *Coplin* and *Harris* are different. We reject the matters that were not presented to the lower court. On our record, the taxpayers must prevail.

a. *The Language*

The district court placed determinative reliance on the "unmistakably clear" language of paragraph two

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[6] Taxpayers noted the suspicious introduction of this evidence due to a recent $40 million gift to the Panamanian government whose administration had changed in October 1984. Taxpayers further attacked the "strangely identical" letters attached to the note from persons who were not active negotiators of the provision in question. Lastly, the appellees in *Coplin* suggested that the note could not be considered as evidence of intent in September 1977. At best, it showed intent as of February 1985.

of Article XV. Judge Bowen wrote, "I read this paragraph as being subject to or needful of no interpretation. It says what it says." 585 F.Supp. at 863. Rejecting the government's legislative history, the court wrote: "It would take a higher intellect than mine to construe confusion where there is so much clarity in the language utilized." *Id.*, unnumbered footnote.

Paragraph two of Article XV speaks in clear and sweeping terms. It provides that U.S. citizen employees of the PCC "*shall be exempt from any taxes*, fees, or other charges on income received as a result of their work for the Commission" (emphasis added). The government concedes that a broad exemption from domestic taxation exists if the language is given its literal effect. It asserts, however, that such an interpretation is achieved only by wrenching the words out of context. We disagree.

In contrast to the all-inclusive language found in paragraph two, paragraph one establishes an exemption for the Commission itself, limited "to payment in the Republic of Panama of all taxes". Paragraph three, dealing with personal property, gift and inheritance taxes of U.S. citizen employees, contains an identical limitation. It provides that the presence of the property of Americans "within the territory of the Republic of Panama shall not give rise to the exercise of taxing jurisdiction."

The absence of limiting language in paragraph two, in contrast to paragraphs one and three, demonstrates that "exempt from any taxes" meant just that. Paragraph two was not intended to create an exemption only from payment of Panamanian taxes. The presence of the specific limiting language in paragraphs one and three is persuasive evidence that the absence

of similar language in paragraph two was intentional.

The government contends, however, that the presence of the limiting language in paragraphs one and three shows that such language also was intended to be used in paragraph two, except that it was omitted by inadvertence or oversight. This assumes that the government was represented by an inexperienced negotiating team whose drafting errors now need rectification. That was not the case. It was represented by a distinguished negotiating team, obviously aware that the Treaty was a foreign policy mission of the highest magnitude.

Reviewing other taxation provisions of the Treaty package, we find specific references to Panamanian taxation. For example, paragraph 9 of Article IX provides that vessels passing through the Canal "shall be exempt from any taxes . . . by the Republic of Panama." Similarly, paragraph 2(e) of Article XI of the Agreement provides that U.S. PCC contractors "shall not be obliged to pay any tax . . . to the Republic of Panama" provided they are taxed in the U.S. at a substantially equivalent rate. As noted by Judge Kozinski in *Coplin*, "This is an agreement drafted by sophisticated parties, obviously capable of using precise language." 6 Cl.Ct. at 127.

The affidavit of Michael Kozak, State Department negotiator, indicates that the operative language of Article XV was taken from the standard Status of Forces Agreement (SOFA) negotiated between the U.S. and foreign countries in which U.S. armed forces members and employees are stationed. The SOFA language is virtually identical to the language of paragraph two of Article XV in the Agreement before us, except that in the second sentence an ex-

plicit reference is made to taxation "as is provided by Panamanian law":

> Members of the Forces or the civilian component, and dependents, shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the United States Forces or for any of the service facilities referred to in Articles XI or XVIII of this Agreement. Similarly, *as is provided by Panamanian law*, they shall be exempt from payment of taxes, fees, or other charges on income derived from sources outside of the Republic of Panama.

Article XVI, Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, T.I.A.S. No. 10032 (emphasis added).

Amici report that an earlier draft, dated June 26, 1977, of the tax exemption language at issue contained the reference to Panamanian law underscored above.[7] Again, deletion of qualifying language must be considered deliberate.

Moreover, tax exemption clauses are well known to the Treasury, Defense, and State Departments from other treaties. Given this depth of experience, we cannot accept the government's position that its negotiating team adopted language that incorrectly expressed the intent of the Treaty signatories.

b. *Legislative History and Treaty Negotiations*

As previously noted, clear treaty language controls unless it effects a result inconsistent with the intent

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[7] At oral argument, counsel for the government suggested that the phrase "as is provided by Panamanian law," was dropped from the second sentence of paragraph two because it was merely "surplusage."

and expectations of the signatories. *Sumitomo*, 457 U.S. at 180, 102 S.Ct. at 2377. Where language is susceptible to differing interpretations, extraneous materials bearing on the parties' intent should be considered. *Hidalgo County Water Control and Improvement District v. Hedrick*, 226 F.2d 1, 8 (5th Cir.1955), *cert. denied*, 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed. 851 (1956); *Corliss v. United States*, 567 F.Supp. 162, 164 (W.D.Ark.1983). Here, we must consider the interests and intentions of both parties to the Treaty "to secure equality and reciprocity between them." *Jordan v. Tashiro*, 278 U.S. 123, 127, 49 S.Ct. 47, 48, 73 L.Ed. 214 (1928).

The district court had before it the affidavit of Dr. Carlos Alfredo Lopez Guevara, Ambassador Extraordinary and Plenipotentiary, who acted as the chief Panamanian negotiator. Guevara stated that the United States proposed the language of paragraph two without explanation, and the Panamanians accepted it without objection. Guevara said further that the language of paragraph two was intended to preclude both the United States and Panama from taxing American employees of the PCC, that it was so read by Panama, and that a contrary interpretation by the United States would be viewed as a material breach of the treaty. At oral argument, counsel for the government characterized Guevara's affidavit as personal statements "out of step" with his government.

Plaintiffs' summary judgment motion was supported also by sworn statements from Juan Antonio Tack, Minister of Foreign Relations and head of the Panamanian negotiating staff between 1970 and 1976; and Demetrio B. Lakas, Panama's then President. Both said clearly that the language at issue created

a tax exemption for U.S. citizen PCC employees in both countries. Tack's letter, interpreted from Spanish, stated: "The general spirit of such a provision was that the U.S. citizens working in the canal administration should be granted some type of economic incentive, in addition to their salaries, for obtaining the highest yield in their specialized functions."

In fact, many provisions of the Treaty secured PCC employees' rights and created special inducements for them to remain on the job.[8] Taxpayers' suggestion that a U.S. tax exemption was intended as part of the package of inducements is not unreasonable.

The only affidavit filed by the government in support of its summary judgment motion was that of Michael Kozak, Deputy Legal Advisor to the State Department. The Kozak affidavit undermines the government's position. Unlike Guevara, Kozak was not privy to the actual negotiations on the tax exemption issue.

Counsel for the government conceded in *Coplin* that the Kozak affidavit "may not be used to divine the purpose of Article XV." 6 Cl.Ct. at 132 n. 16. Several lower courts holding for the government relied on the unimpeached Kozak affidavit. *See, e.g., Stabler v. United States*, 84-1 U.S.Tax Cas. (CCH)

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[8] For example, Article X, paragraph 10(b) creates an affirmative duty on the part of the U.S. to seek legislation which provides more liberal retirement benefits. Other provisions of the Agreement that favor PCC employees include: Article XII, Entry and Departure; Article XIII, Services and Installations; Article XIV, Licenses; Article XVI, Import Duties; Article XVIII, Claims; and Article XIX, Criminal Jurisdiction.

¶ 9153, at 81-185-86 (N.D.Tex.1983); *Pierpoint v. United States*, 83-2 U.S.Tax Cas. (CCH) ¶ 9647, at 88,329 (D.S.C.1983).

The government's reliance on the Senate hearings and Senate Report accompanying the Treaty also is misplaced. In its brief, the government quotes this interchange between Senator Richard Stone and Herbert J. Hansell, Legal Advisor to the State Department, who was testifying before the Senate Foreign Relations Committee:

> Senator STONE: I think it was article XV, section 1 that raised an interesting question. I will read it to you. 'By virtue of this agreement the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees, or other charges on their activities or properties.' Then, in No. 2, referring to U.S. citizen employees and dependents, it says, 'shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payments of taxes, fees, or other charges on income derived from sources outside the Republic of Panama.'
>
> Of course, when that was announced, the press reported the glee of the Zonians that they were now exempt from U.S. income tax. When Senator Glenn asked you, are there any words that you would like to see in the treaty, I was just asking myself, would you like to see the words. United States, in there somewhere?
>
> Mr. HANSELL. I am sorry to be a source of disappointment for the Panamanians, but obviously we are not entering into an agreement between the United States and Panama that would

exempt U.S. citizens from U.S. tax. The purpose of this, of course, was to exempt them from Panamanian tax.

* * * * *

Senator STONE. Wouldn't you think that we could put in the understanding that I suggested to you, the clarification of our interpretation which then, when ratified by the Congress, by the Senate, and deposited, would clarify that in a little more formal way than simple advices, since you don't want to put words back in the treaty through negotiation?

Mr. HANSELL. The one comment I would have with respect to that, and this relates to a couple of other points, is that we are dealing now with an internal U.S. matter, not a matter between the United States and Panama. That is, we don't agree with Panama how we are going to tax our citizens. That is obviously an internal matter. I would hope we could find ways of dealing with internal matters other than as understandings.

Panama Canal Treaties: Hearings Before the Committee on Foreign Relations, 95th Cong., 1st Sess. 268 (1977).

Far from supporting the government, the colloquy underscores the significance of the government's failure to clarify Article XV(2). The Senator was concerned that the tax issue could spawn litigation and suggested clarification through one of several established diplomatic channels. Hansell rejected the suggestion and responded by characterizing it as an "internal matter" which the government would find a way to avoid.

Moreover, Senator Stone's suggestion that the taxation issue be clarified through an exchange of notes or an "understanding" comports with standard diplomatic negotiating practice. The day the Treaty was signed, there was an extensive exchange of notes between the two nations. These notes supplied additional clarification and assurances regarding many of the provisions covered in the Treaty documents. *See, e.g., Exchange of Notes Relating to Post Services,* Sept. 7, 1977, reprinted in S.Exec.Rep. 95-12, 95 Cong., 1st Sess. (1978), at 726. We find no note exchange pertaining to Article XV on taxation despite ample opportunity between September 1977 when the Treaty documents were signed and October 1979 when they became effective.

Nor does Senate Executive Report No. 95-12 provide competent evidence on intent of the parties to the Agreement. The government urges that we give great weight to the meaning ascribed to Article XV (2) by the federal department charged with the Treaty's negotiation and enforcement. It relies on the State Department's section by section analysis included in the Senate Foreign Relations Committee Report for such meaning.

However, in *Coplin,* the government conceded that the section by section analyses were prepared by Michael Kozak and Geraldine Chester, neither of whom were present at any negotiating session during which the substance of Article XV was discussed. The government conceded also that the analyses were prepared after the negotiations had been completed and the Treaty documents had been signed. *Coplin,* 6 Cl.Ct. at 128. We reject the government's attempt to establish intent through documents it prepared

after the fact.[9] *Cf. Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980) (remarks of a single legislator on the committee are not controlling on legislative history).

Again, many of the lower courts that ruled for the government on this issue relied on the unimpeached Senate Report. *See, e.g., Rego v. United States*, 591 F.Supp. 123, 124 (W.D.Tenn.1984); *Corliss*, 567 F. Supp. at 165-66; *McCain v. Commissioner*, 81 T.C. 918, 928-29 (1983). In sum, the competent affidavits and legislative history before the district court fully support the taxpayers' position that the parties intended a bi-national tax exemption.

c. *Other Considerations*

The government contends erroneously that unrestricted U.S. taxation of income earned in Panama by Americans would mirror the pre-1977 *status quo*. As previously indicated, American citizen PCC employees historically were either free of U.S. tax (before 1951) or taxed at a reduced level (after 1951). We consider the tax treatment of PCC employees to be a unique situation. Appellees, therefore, are not subject to the fundamental principle of U.S. tax law that the world-wide income of U.S. citizens is subject to taxation by this government regardless of the person's residence or the source of that income. *See Cook v. Tait*, 265 U.S. 47, 56, 44 S.Ct. 444, 445, 68 L.Ed. 895 (1924).[10]

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[9] The dearth of evidence of negotiating history before *Coplin* was tried in the Claims Court may explain why lower courts generally have ruled for the government.

[10] "Gross income" in Section 61 of the Internal Revenue Code of 1954 does not include income excluded "by any treaty obligation of the United States." 26 U.S.C. § 894(a) (1982).

Amici report that in 1974, only 88 Americans residing in Panama filed income tax returns. The total income of these Americans averaged about $32,000 and, according to Treasury Department estimates, produced about $600,000 of tax liability. Compared to the significant economic concessions made by this government as part of the Treaty package, the amount of potential tax revenues that would be lost through the exemption at issue may be considered slight.

Moreover, the number of Americans to benefit by a tax exemption is declining. Article III, paragraph 8, of the Treaty provides for "growing participation" of Panamanian nationals at all levels and areas of employment, with the objective of preparing, in an orderly fashion, for the assumption of full responsibility for Panamanian management of the canal in the year 2000.

In conclusion, we find that the clear language of Article XV(2) of the Agreement creates a bi-national tax exemption for PCC employees. The government has failed to produce competent evidence that Panama and the United States "intended to agree on something different from that appearing on the face of" Article XV of the Agreement. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943) (Indian treaties). The government must live with the language it drafted.

AFFIRMED.

As the Supreme Court recognized in *Weinberger v. Rossi*, 456 U.S. 25, 29, 102 S.Ct. 1510, 1514, 71 L.Ed.2d 715 (1982), "The word 'treaty' has more than one meaning." We are persuaded that the phrase "treaty obligation" in Section 894 is broad enough to include executive agreements that are signed by the President pursuant to constitutional or statutory authority.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8424

D.C. Docket No. 183-77

RALPH D. HARRIS and
JOAN F. HARRIS, PLAINTIFFS-APPELLEES

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Georgia

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Before KRAVITCH and CLARK, Circuit Judges, and WRIGHT *, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

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* Honorable Eugene A. Wright, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered:

August 14, 1985

For the Court:

SPENCER D. MERCER
Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate: Oct. 1, 1985

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action CV183-077

RALPH D. HARRIS and
JOAN F. HARRIS, his wife, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed March 21, 1984]

ORDER

During the taxable year of 1979, the plaintiffs in the abovestyled case resided in the territory within the Republic of Panama that formerly constituted the Canal Zone. They worked for, and received a salary from, the Panama Canal Commission. At the appropriate time, they filed a joint federal income tax return and paid the taxes allegedly due for 1979.

In 1980, the plaintiffs filed a refund claim for excessive taxes paid in 1979 in the amount of $6,647.00. The claim showed a decrease in total income which represented salaries received from the Panama Canal Commission between October 1, 1979, and December

31, 1979. The Internal Revenue Service disallowed this refund claim, and the plaintiffs initiated this civil suit. Presently before the Court are motions from the plaintiffs and the defendant for summary judgment.

The issue involves the Panama Canal Treaty, which became effective on October 1, 1979. In the agreement in Implementation of Article III of the Panama Canal Treaty, Article XV—which is entitled "Taxation"—reads as follows:

TAXATION

1. By virtue of this Agrement, the Commission, its contractors and subcontractors, are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly, they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the implementation of this Article.

The plaintiffs in their motion for summary judgment claim that the second paragraph of Article XV exempts them from any taxation by the United States government on the income that they received from the Panama Canal Commission. The defendant contends that paragraph two allows an exemption only from Panamanian taxes, rather than United States taxes. In support of its position, the government cites *Corliss v. United States*, 83-2 U.S.T.C., ¶ 9447 (W.D. Ark. 1983).

Paragraph two of Article XV is unmistakably clear. I disagree with the *Corliss* court. I read this paragraph as being subject to or needful of no interpretation. It says what it says. That is: "United States citizen employees shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission." Even more, it goes on to state that "they [United States citizen employees] shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama." Regardless of the President's and the Senate's misunderstanding of the effect of the treaty, this provision exempts from taxation all income received as a result of work done for the Panama Canal Commission.

I have no quarrel with the authorities cited by the *Corliss* court; however, I disagree strongly with the holding and the suggestion that paragraph two of Article XV requires an interpretation. It is unambiguous, even in the context of paragraphs one, three and four which deal with other subject matters.

This problem was raised on the floor of the Senate and that body left the troublesome language as it was. I cannot strain now to favor the defendant by voicing an interpretation which would achieve a re-

sult which could have been assured by the timely insertion of a few words.*

There is no genuine issue as to any material fact, and the plaintiffs are entitled to judgment as a matter of law. The plaintiffs' motion for summary judgment is GRANTED, and the defendant's motion is DENIED.

ORDER ENTERED at Augusta, Georgia, this 20th day of March, 1984.

/s/ Dudley H. Bowen, Jr.
United States District Judge

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* I have read, in Spanish, the correspondence and affidavits appended to the supplemental memorandum filed by plaintiffs on March 8, 1984. It appears that there was no confusion on the Panamanian side of the treaty as to the effect of Paragraph 2 of Article XV. It would take a higher intellect than mine to construe confusion where there is so much clarity in the language utilized.

APPENDIX D

Panama Canal Treaty Between the United States of America and Panama, Sept. 7, 1977, T.I A.S. No. 10030:

ARTICLE III

Canal Operation and Management

* * * * *

9. The use of the areas, waters and installations with respect to which the United States of America is granted rights pursuant to this Article, and the rights and legal status of United States Government agencies and employees operating in the Republic of Panama pursuant to this Article, shall be governed by the Agreement in Implementation of this Article, signed this date.

* * * * *

Agreement Between the United States of America and Panama in Implementation of Article III of the Panama Canal Treaty, Sept. 7, 1977, T.I.A.S. No. 10031:

ARTICLE XV

Taxation

1. By virtue of this Agreement, the Commission, its contractors and subcontractors are exempt from payment in the Republic of Panama of all taxes, fees or other charges on their activities or property.

2. United States citizen employees and dependents shall be exempt from any taxes, fees, or other charges on income received as a result of their work for the Commission. Similarly,

they shall be exempt from payment of taxes, fees or other charges on income derived from sources outside the Republic of Panama.

3. United States citizen employees and dependents shall be exempt from taxes, fees, or other charges on gifts or inheritance or on personal property, the presence of which within the territory of the Republic of Panama is due solely to the stay therein of such persons on account of their or their sponsor's work with the Commission.

4. The Coordinating Committee may establish such regulations as may be appropriate for the Implementation of this Article.

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